NO. 82-1095

IN THE SUPREME COURT

OF THE UNITED STATES

October Term 1983

R. PULLEY, Warden of the California State Prison at San Quentin,

Petitioner,

v.

ROBERT ALTON HARRIS,

Respondent.

REPLY BRIEF

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PETITION FOR CERTIORARI FILED DEC. 19, 1982
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ARGUMENT

I

INTRODUCTION - A MORE SHARPLY DEFINED STATEMENT OF THE ISSUES AND SUMMARY OF ARGUMENT

With the filing of the briefs on the merits in this case, it is now far more clear where the parties agree and where they diverge.

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Petitioner and respondent agree that death judgments must be proportional. We disagree, however, on what constitutes proportionality. Further, we agree that capital defendants have the right to challenge what they perceive as a lack of proportionality in their death judgments, but we disagree on precisely how the issue is to be raised and addressed. In other words, the issues are; (1) what is "proportionality", and (2) what kind of "review" is required.

A. Proportionality

Harris, amicus curiae, and the Ninth Circuit envision proportionality as a "comparative review." Under their view all circumstances in each death judgment case must be compared with all the circumstances in every other case in which the sentencing authority was presented with the opportunity to enter a death

judgment. Then the question would be whether the instant defendant received a death judgment while others no less deserving of execution were spared.

To the contrary, we contend that this Court clearly and conclusively defined "proportionality" at the end of last term in Solem v. Helm ___ U.S. ___ (June 28, 1983) 51 U.S.L.Week 5019). Relying on century-old constitutional principles, this Court in Helm established a clear three-step constitutional proportionality analysis which involves an examination of broad classes of conduct to determine, in general, whether the proposed punishment is disproportionate for that class of conduct.

B. Review

Harris, amicus curiae, and the Ninth Circuit urge that proportionality must be reviewed mandatorily by the

state's highest court irrespective of whether the issue is raised by the parties and even though, on the facts of a particular case, the issue would be frivolous even if raised. Further, it is urged that the review must be expressly acknowledged by the state's highest court with findings and conclusions reported in each case.

We urge that proportionality is no different than any other constitutional issue. It is one which may be raised by the defendant who must then demonstrate the violation he alleges. Only then need it be examined by the courts. It could be raised in the trial court and on direct appeal. The issue can also be raised on state habeas corpus or federal habeas corpus. No specially designed separate review process is

constitutionally necessary, nor is review invariably mandatory.

C. The California Supreme Court Has Spoken Clearly and Conclusively Both on Proportionality Review and on the Disposition of the Present Case.

Harris' position on the above issues has given rise to a confusion on his part as to whether the California Supreme Court has formulated its position on proportionality review and whether that court has reached a final disposition of Harris' case.

Because of this, Harris argues that this Court should not decide the proportionality review issue until California has completed setting up its proportionality review system. Furthermore, he argues that the California Supreme Court has established his right to proportionality review under state law

but has denied it to him in violation of federal due process guaranties.

California's position on proportionality is clearly settled. In 1979 (prior to Harris' Supreme Court appeal) the California Supreme Court announced that long-established state law proportionality principles are available to capitally sentenced defendants. (People v. Frierson (1979) 25 Cal.3d 142, 183; In re Lynch (1972) 8 Cal.3d 410, 425-427.) Furthermore, these long-established California proportionality principles are based on precisely the same three-step proportionality analysis this Court announced last term. (Solem v. Helm, supra, 51 U.S.L.Week at p. 5023.) Thus, both the California Supreme Court and this Court have spoken conclusively on the issue, and they have spoken with one voice.

It is obvious then that California has not denied Harris the opportunity to raise this issue. He has had innumerable opportunities to raise it and has chosen not to because, as to him, it would be patently frivolous.

Therefore, the California Supreme Court has clearly reached a final disposition as to Harris. First the California Supreme Court affirmed his death judgment on direct appeal. Then, that court denied his petition for habeas corpus in an order which also vacated the previously granted stay of execution. Except for the possibility of executive clemency, California is through with Mr. Harris and is ready for the judgment to be executed.

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II

THE "PROPORTIONALITY REVIEW" ISSUE IS QUITE PROPERLY BEFORE THIS COURT AND SHOULD BE ADDRESSED

A. The California Supreme Court Has Established and Defined the California Constitution's Proportionality Requirements.

After spending the last five years (including three petitions to this Court) complaining about the lack of proportionality review in his case, Harris is finally before this Court with an opportunity to argue his issue. Ironically, in the face of this, Harris spends about half of his brief arguing that this Court should not even decide the issue.

First, he argues that the California Supreme Court is still formulating its approach to proportionality review and that it would be inappropriate

for this Court to decide the issue before California has had a shot at it. This is preposterous.

The issue was decided in California in People v. Frierson, supra, 25 Cal.3d 142. In Frierson the California Supreme Court declared the death penalty statute involved in this case to be constitutional. In the face of an argument that proportionality review was required, and lacking, the court expressed its doubt that "proportionality review" as a specific, separate entity, was constitutionally required. (People v. Frierson, supra, at p. 181.) However, the court strongly and expressly reaffirmed, "well-established proportionality principles of general application" under the State Constitution, citing its own landmark case, In re Lynch, supra, 8 Cal.3d 410. Detailing the precise

contours of such a proportionality analysis the court said:

> "In determining disproportionality under Lynch, we examine 'the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society.' (8 Cal.3d at p. 425.) In addition, we ascertain whether more serious crimes are punished in this state less severely than the offense in question. If so, 'the challenged penalty is to that extent suspect.' (Id., at p. 426.) Finally, under Lynch we compare the challenged penalty with the punishments prescribed for the same offense in other jurisdictions having identical or similar constitutional provisions regarding cruel and/or unusual punishment. (Id., at p. 427.)" (People v. Frierson, supra, 25 Cal.3d at p. 183.)

This clear statement in Frierson was reaffirmed the following year in People v. Jackson (1980) 28 Cal.3d 264, 317, wherein the California Supreme Court made it clear that the Lynch test was

California's standard for proportionality analysis.[1/]

Harris makes much out of a dialogue between Justice Kaus and Chief Justice Bird in their separate concurring and dissenting (and now vacated) opinions in People v. Easley (1982) 33 Cal.3d 65 (decision on rehearing pending). This dialogue is irrelevant to the issue now before this Court. At the most, those vacated separate opinions suggest that two out of seven justices are not sure they agree with the clear majority of the Court. This is of no consequence. As

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1. At the same time the California Supreme Court indicated it was "fully prepared to afford whatever kind of proportionality review may be held constitutionally mandated," by this Court. (People v. Jackson, supra, 28 Cal.3d at p. 317.) This Court last term did define "proportionality" using precisely the same three-part test California uses under Lynch, Frierson, and Jackson. (Solem v. Helm, supra, 51 U.S.L.Week at p. 5023.)

demonstrated above, a majority of the California Supreme Court has spoken clearly and conclusively on the point. That constitutes California's law on the subject.

B. Harris Has Not Been Denied the Opportunity to Present His Proportionality Arguments.

Harris also urges that in Frierson and Jackson the California Supreme Court established his right to a proportionality review, but has denied him that review. Thus he urges this denial of a "state created right" violates federal due process principles.

He is wrong on two grounds. First, as has been demonstrated, the California Supreme Court did not establish a right to a particular form of proportionality review. Rather, it established Harris' right to raise the issue of proportionality if he chooses.

Second, he has not been denied the opportunity to raise the issue. He has simply not taken the opportunity because, as to him, the issue would be a frivolous one.

Lynch was established California law six years before appellant committed his crime. Frierson reaffirmed Lynch's applicability to death judgments in ample time for that case to be discussed on Harris' direct appeal. In fact, Frierson was addressed by Harris on direct appeal, but only to dispute its conclusion that California's statute was constitutional. Harris made no effort to avail himself of the proportionality analysis that had been offered him in Frierson.

On state habeas corpus Harris made "boilerplate" conclusory allegations that the death penalty had been imposed on him under circumstances,

> ". . . no more deserving of the death penalty under any legitimate penological justification for capital punishment than are the many death-eligible defendants on whom the death penalty is not imposed." (Harris Petition for Writ of Habeas Corpus, California Supreme Court, CRIM. 22380, p. 4.)

However, these bare conclusions were not supported by any specific factual allegations, nor do they relate to the specific three-part test which had been offered to Harris in Lynch and Frierson. Furthermore, there was no Lynch/Frierson proportionality analysis presented in his state habeas corpus petition.

In his brief Harris complains that he is, "entitled to know whether [proportionality review] exists, and what it is, so he can resort to it before being put to death." (Brief for Respondent, p. 55.) This comment is, at best, disingenuous. California had made the standards for any proportionality argument crystal

clear to Mr. Harris. He has chosen, to date, not to avail himself of such an argument for the obvious reason that on the facts of this case he has no valid position to take which would entitle him to any relief.

It is thus not only proper but necessary for this Court to address the merits of the Ninth Circuit's ruling on the issue of "proportionality review." California law is fully and clearly formed on the matter, and is precisely the same as this Court's pronouncements under the Federal Constitution. Furthermore, the California courts are through with Mr. Harris. His judgment has been affirmed on direct appeal, his habeas corpus petitions have been denied, and his stay of execution has been vacated. His only remaining opportunities for judicial relief are in the federal system.

III

PROPORTIONALITY ANALYSIS DOES NOT REQUIRE DETAILED COMPARISON OF EACH CAPITAL CASE WITH EVERY OTHER CAPITAL-ELIGIBLE CASE IN THE STATE

Harris, amicus curiae, and the Ninth Circuit all share a common misconception of the scope of a proportionality analysis under the Federal Constitution. The assumption is that such an analysis requires all aggravating and mitigating factors in each case to be compared with the aggravating and mitigating factors in all other cases which could have resulted in the death penalty to determine whether the defendant in question has been sentenced to die while others no less deserving of death have been spared. There are three things wrong with this. First, it is directly contrary to recent decisions of this Court. Second, it

would present an unworkable administrative nightmare to the states. Third, it would work an unacceptable intrusion on the constitutionally favored role of the jury in expressing contemporary community values.

At the end of last term this Court took the opportunity to declare the specific requirements under a federal constitutional proportionality analysis. In Solem v. Helm, supra, 51 U.S.L. Week 5019, this Court reaffirmed the principle that the Eighth Amendment to the Federal Constitution, "prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed." (Id., at p. 5021.) And that, "the constitutional principle of proportionality has been recognized explicitly in this Court for almost a century." (Id., at p. 5022.)

Synthesizing the analyses of its previous cases this Court announced the establishment of a clear three-step test for proportionality analysis, holding:

> "In sum, a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." (Solem v. Helm, supra, 51 U.S.L. Week at p. 5023.)

From the analysis in Helm, it is apparent that the newly announced three-part test was at work in this Court's previous decisions in Coker v. Georgia (1976) 433 U.S. 584 and Enmund v. Florida ___ U.S. ____ (July 2, 1982) 50 U.S.L.Week 5087). In Coker, this Court concluded that proportionality

principles precluded the imposition of the death penalty for the rape of an adult woman. In Enmund this Court concluded that proportionality principles precluded the death penalty for one convicted of murder but who did not personally kill and who did not intend death to occur. In Helm it was held that proportionality principles precluded a life sentence for one who passed a one hundred dollar bad check.

It is clear from a reading of Coker, Enmund, and Helm that a proportionality analysis does not require a complicated evidentiary proceeding in which all of the circumstances underlying each death sentence are compared with all of the circumstances underlying every other case where death was at issue. No comparative reweighing of the aggravating and mitigating factors is necessary at

all. Rather, proportionality analysis involves a much broader and more abstract issue in which broad classes of conduct (i.e. rape, murder by one who neither killed nor intended death, passing a bad check) are examined. The question under such an analysis is whether the proposed punishment is shockingly overharsh, or whether legislatures, juries, and courts have so overwhelmingly refused to impose the proposed penalty that an almost universal repudiation of it is evident.

This point was made explicit in the majority opinion in Helm.

> "Contrary to the dissent's suggestions, post, at 2, 12, we do not adopt or imply approval of a general rule of appellate review of sentences. Absent specific authority, it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence; rather, in applying the Eighth Amendment the appellate court decides

> only whether the sentence under review is within constitutional limits. In view of the substantial deference that must be accorded legislatures and sentencing courts, a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate." (Solem v. Helm, supra, 51 U.S.L.Week at p. 5023, fn. 16.)

We have noted that the proportionality analysis established in Helm is precisely the same analysis established under the California Constitution in In re Lynch, supra, 8 Cal.3d 410, and People v. Frierson, supra, 25 Cal.3d 142. We have also noted that Harris has raised no arguments under the Lynch/Frierson/Helm analysis because that analysis would clearly entitle him to no relief whatsoever. In this regard it should be noted that Harris was only six months out on parole from a previous personally committed homicide when he kidnapped and

robbed two teen age boys whom he personally and cold-bloodedly executed. After the boys were dead he fired an additional, unnecessary bullet into one boy's head at point-blank range just to see what it would be like, and then sat down and finished the boys' unfinished breakfast of hamburgers, laughing at his younger brother for not having the stomach to do the same.

'Without necessity of any further reference to the additional grisly circumstances of Harris' crime and record this Court could and should rule as a matter of law that death for such conduct is not disproportionate. It would seem undeniable, given the constitutionality of capital punishment in the abstract, that such intentional and multiple murders are fully supportive of a death judgment. Furthermore, it has

not, and cannot be shown that either an overwhelming majority or even a significant minority of legislatures, courts, or juries in states with capital punishment have acted to repudiate death as a punishment for such crimes. It is for this reason that we have repeatedly said that if capital punishment is constitutional as to anyone, it is as to Robert Harris.

Not only is Harris' vision of proportionality inconsistent with this Court's settled case law, it would be an utterly unworkable one which would improperly invade the jury's traditional role.

The jury's judgment in a death penalty case is a deeply spiritual and subjective expression of contemporary community values. It was for this very reason that this Court disapproved

mandatory death penalty systems in Woodson v. North Carolina (1976) 428 U.S. 280, and Roberts v. Louisiana (1976) 428 U.S. 325. As anyone familiar with capital cases is aware, the variations in aggravating and mitigating circumstances in such cases are infinite and simply not subject to the mechanical quantification expressly envisioned by amicus curiae. (Brief of Amicus Curiae, pp. 40-41.) The facts of each case are unique and, in the context of a constitutionally drawn death penalty statute, must simply be commended to the judgment of the sentencing authority. Although that authority operates within broad constitutional limits, it must have wide latitude within those limits to weigh the value of each of the unique factors in a case and synthesize all those individual value judgments into the ultimate judgment on sentence.

The fact that one jury might decide a case differently than another is a historic and invariable fact of our proudly human system. So too, the fact that a judge or court might have voted a different sentence in a particular case is of no moment so long as the judgment is not completely beyond the limits of the Constitution.

Any judicial proportionality review that attempts to reweigh all the factors of one unique case presented to one jury and compare those to all the factors in a different unique case presented to a different jury can only be an invitation for the courts to usurp the jury's traditional role, "to maintain a link between contemporary community values and the penal system." (Woodson v. North Carolina, supra, 428 U.S. at

p. 295, quoting Witherspoon v. Illinois (1968) 391 U.S. 510.)

Although the historic actions of juries in death penalty cases may be relevant on the issue of proportionality, this is only so to the extent that history demonstrates a virtual repudiation of the death penalty as to the broad class of conduct at issue. This Court clearly expressed these same concerns late last term in the majority opinion in Barclay v. Florida ____ U.S. ____ (July 6, 1983) 51 U.S.L.Week 5206.)

> "Any sentencing decision calls for the exercise of judgment. It is neither possible nor desirable for a person to whom the state entrusts an important judgment to decide in a vacuum, as if he had no experiences. The thrust of our decisions on capital punishment has been 'that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.' Zant v. Stephens, ___ U.S. ____, 11

(1983), quoting Gregg v. Georgia, 428 U.S. 153, 189 (1976) (opinion of Steward, Powell, and Stevens, JJ.). This very Term we said in another capital case:

"'In returning a conviction, the jury must satisfy itself that the necessary elements of the particular crime have been proved beyond a reasonable doubt. In fixing a penalty, however, there is no similar "central issue" from which the jury's attention may be diverted. Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, as did respondent's jury in determining the truth of the alleged special circumstance, the jury then is free to consider a myriad of factors to determine whether or not death is the appropriate punishment.' California v. Ramos, ____ U.S. ____, 14 (1983).

"We have never suggested that the United States Constitution requires that the sentencing process should be transformed into a rigid and mechanical parsing of statutory aggravating factors. But to attempt to separate the sentencer's decision from his experiences would inevitably

> do precisely that. It is entirely fitting for the moral, factual, and legal judgment of judges and juries to play a meaningful role in sentencing. We expect that sentencers will exercise their discretion in their own way and to the best of their ability. As long as that discretion is guided in a constitutionally adequate way, see Proffitt v. Florida, 428 U.S. 242 (1976), and as long as the decision is not so wholly arbitrary as to offend the Constitution, the Eighth Amendment cannot and should not demand more." (Barclay v. Florida, supra, ____ U.S. ____ (51 U.S.L.Week at p. 5209.)

It is thus clear that proportionality does not and could not involve the sort of specific comparative review Harris urges. Also, although he does not and has not urged it, it is clear that a proper proportionality analysis could not lead to the conclusion that his sentence is disproportionate.

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IV

REVIEW OF PROPORTIONALITY REQUIRES NO SPECIAL PROCEEDING AND IS NOT MANDATORY IN EVERY CASE

The other major area of disagreement between the parties centers around the form that review of proportionality must take. Harris, amicus curiae, and the Ninth Circuit envision a review that must be conducted by the state's highest court in every case whether or not the issue is raised by the parties or the facts. Further, it is implicitly held by the Ninth Circuit that the state's highest court must acknowledge, on the record, that it has done such a review and must detail its conclusions.

This makes no sense whatsoever. Proportionality is no different than any other constitutional issue. If the facts

of the case present the issue the parties can raise it and the courts can rule on it.

Harris relies heavily on this Court's previous rulings expressing concern that state death judgments be made, "rationally reviewable." From this he concludes, "It would be a remarkable Eighth Amendment that required 'reviewability' without requiring review." (Brief for Respondent, p. 67.)

Not so. Certainly the issue of proportionality is of no more fundamental concern than the voluntariness of confessions. Yet we are aware of no cases requiring the state's highest court to review the voluntariness of confessions in the absence of issues raised and supportive facts offered. Furthermore, this Court has in the past based constitutional holdings on the need for

reviewability without attaching an invariable obligation of review.

For example in Boykin v. Alabama (1969) 395 U.S. 238, this Court noted that a plea of guilty is even, "more than a confession," and required specific on the record procedures for the taking of the waivers of constitutional rights involved in a plea of guilty. The express purpose of this requirement was so that waivers could be properly reviewed. Yet there has been no concomittant requirement that review invariably follow in each case. As with other constitutional issues such as proportionality, such review is to be had if the issue is raised based on supportive facts.

To make any such review of proportionality automatically mandatory would be wasteful and far better designed

to make the death penalty too cumbersome to work than to insure proportionality. The standards of proportionality are clearly enunciated both in California and under the Federal Constitution. It is enough that a defendant be given the opportunity to raise the issue if he chooses and if he can make a colorable argument. If the state courts decide the issue incorrectly, as was done in Coker, Enmund, and Helm, the federal courts are always available for further review.[2/]

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2. Harris also argues that this Court's decisions make "meaningful appellate review" an Eighth Amendment necessity. (Brief for Respondent, p. 71.) No majority of this Court has so held. In fact it has been an unchallanged part of this Court's death penalty debate that "there is no right to appellate review of a criminal sentence. McKane v. Durston, 153 U.S. 684 (1894)." (Woodson v. North Carolina, supra, 428 U.S. at p. 316 (dis. opn. of Rehnquist, Jr.).) This case, however, does not raise that issue since California agreees with Harris on the importance of "meaningful appellate review" and provides it automatically by statute. (Cal. Pen. Code, § 1239.)

V

CALIFORNIA'S PROCEDURES HAVE SATISFIED THE UNITED STATES CONSTITUTION

California's proportionality principles are clear and well established. They are precisely those announced by this Court under the Federal Constitution. Harris could have raised arguments based on these principles in the trial court, on direct appeal, or on state habeas corpus. He did not, presumably because established proportionality principles could not possibly have gained him any relief.[3/]

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3. It is clear that proportionality review is a present reality in California and Harris has no argument available that California courts do not implement the proportionality review established over a decade ago in In re Lynch.

In September of this year the California Supreme Court, relying on In re Lynch, Enmund v. Florida, and Solem v. Helm once again applied the three-part

It is for this reason we have repeatedly said Robert Harris has had all the proportionality review to which he is entitled.

* * *

Footnote 3 continued:

proportionality analysis to reduce a first-degree murder conviction obtained under the felony murder rule, to a second degree murder conviction. (People v. Dillon (1983) 34 Cal.3d 441, 477-489.)

CONCLUSION

For the foregoing reasons petitioner respectfully requests that the judgment of the United States Court of Appeals for the Ninth Circuit be reversed.

Respectfully submitted,

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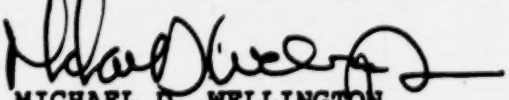

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Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, over 18 years of age, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within REPLY BRIEF as follows: To Alexander L. Stevas, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and 39 copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing three copies in a separate envelope addressed for and to each addressee named as follows:

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Each envelope was then sealed and with the postage prepaid deposited in the United States Mail by me at San Diego, California, on the 25th day of October, 1983.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, October 25, 1983.

CLIFFORD E. REED, JR.

Subscribed and sworn to before me
this 25th day of October, 1983.

Notary Public in and for said County and State